THE STATE AND THE RULE OF LAW IN A MIXED ECONOMY. By W. Friedman. (London: Stevens & Sons, 1971. £2).

In reviewing this book one has to bear in mind that it is the revised text of the Tagore Law Lectures which Professor Friedmann delivered at Calcutta University in January of 1970. The constraints imposed by the format are severe, and given the broad scope of the subject, one can only reasonably expect a treatment in the nature of an overview. We cannot reasonably expect Professor Friedmann to do more than give working definitions to the three troublesome concepts, "state", "Rule of Law" and "mixed economies" which are juxtaposed in the title of his book.

TRINITY OF CONCEPTS

First, on the concept of the state, Professor Friedmann says:

> "In dealing with the 'state' in these lectures, I will understand it both as a focus of centralized power, which results from the balance between various contending social and economic interests, and as the embodiment of certain ideas of justice and public interest encompassing the community as a whole".[1]

In describing the state as "the embodiment of certain ideas of justice and public interest encompassing the community as a whole", Professor Friedmann presumably implies a distinction between the state and the government because the government of the day could be the embodiment of certain ideas of injustice not justice and of private not public interest. But this distinction is not consistently adhered to. An example of such a lapse is the definition of a 'mixed economy' which Professor Friedmann adopts from Professor E. Mason.[2]

Professor Mason says the phrase 'a mixed economy' "is commonly interpreted to indicate a situation in which the role of *government*[3] as owner and regulator has become sufficiently large to cast doubt on the validity of 'capitalist' and 'free enterprise' as appropriate adjectives but not sufficiently large to justify the appellation 'socialist'." It will have been noted that Professor Mason refers to the 'government' and not to the 'state' in that definition. Professor Friedmann does not appear to have taken exception to this usage. One possible explanation is that the theoretical distinction between the two concepts has not been compromised but that in describing the participation of a state in an economy, Professor Friedmann is compelled to descend to the level of objective realities and therefore to talk about the role of government rather than the state because on that plane, the state invariably acts through the government.

My difficulty with Professor Mason's definition of a mixed economy is that it contains no qualitative or quantitative criteria which would enable us to say that this economy is 'capitalist', that another is 'mixed' and a third is 'socialist'. Professor Friedmann subsumes under the umbrella of the mixed economy, the economies of the United States, the United Kingdom, Italy, Canada, France, India and others. If all these are mixed economies then one may have difficulty in finding any 'capitalist' or 'free enterprise' economies. Perhaps this is an important conclusion that Professor Friedmann has arrived at: the pure capitalist economy is no more, it has been transformed into the mixed economy.

The third concept is the Rule of Law. Professor Friedmann says it "has no absolute and static meaning. In a formal sense, the rule of law means any ordered structure of norms set and enforced by an authority in a given community. It is free from any particular ideological content and encompasses tyrannous as well as liberal humanitarian orders". In the particular context of the mixed economy Professor Friedmann would appear to have invested the Rule of Law with two requirements. First, the Rule of Law should ensure the fair coexistence of the private and public sectors of the economy.[4] The second requirement appears to be the requirement of administrative justice for which Professor Friedmann states a powerful and convincing case.[5]

1. At p. 10.
2. At p. 2.
3. Emphasis is mine.
4. See p. 72.
5. See pp. 181-198.

QUARTET OF STATE FUNCTIONS

Professor Friedmann divides the functions of a State in a mixed economy into four: the State as provider, regulator, entrepreneur and umpire.

PROVIDER

The first function of the State, as provider of minimum welfare to its citizens, is unquestionable. Professor Friedmann has raised an interesting question i.e. to what extent has public law supplanted private law in this sphere? He answers that, "as the urbanization, mechanization and standardization of life proceeds, the compensation for certain types of losses traditionally left to private law i.e. principally the law of torts, will be increasingly shifted from the parties immediately concerned to the community".

REGULATOR

The second function of the State is that of regulator. Professor Friedmann suggests that the State resorts to three types of legal controls. These are: "*first*, the legal restraints on freedom of contract and property; *second*, the legal controls seeking to mitigate undue concentration of economic power; and *third*, the legal controls directed to the protection of the national economy — especially in developing countries — by the regulation of the flow of money and goods between the national economy and the outside world".

Freedom of Contract

Freedom of contract is based upon the assumption of approximate equality of bargaining power. This assumption was untrue as between employer and employee before the latter became organised in powerful trade unions. But the assumption remains a myth in other fields. There is no approximate equality of bargaining power between on the one hand, the consumer and on the other, the retailer, the manufacturer, the bus company, the insurance company, the banks and other financial institutions, and such government enterprises as the telephone board or public utilities board. Freedom of contract rests on a myth perpetuated by law-teachers, lawyers and judges and behind its facade the contract law system has been used, as Professor Charles Black [6] has pointed out by the 'haves' to oppress the 'havenots'.

Professor Black says the contract law system:

> "...serves massively and systematically as an intensifier of economic advantage and disadvantage. It does this because people and business who are strong in bargaining positions, or who can afford expensive legal advice, can and epidemically do exact of necessitous and ignorant people contractual engagements which the general law never would impose. Let me give an example. If a poor woman wants a washing machine, and thinks she can pay for it in instalments, and it is delivered, and it turns out to be seriously defective and inoperable then the general law says she does not have to pay. This is obviously just, and obviously inconvenient to the seller. The history of contract law in the field of consumer transactions is a horrible story of devices — some of them successful — to make the woman pay for the worthless washing machine. She may, for example, be required to sign a 'negotiable' promissory note, which is speedily endorsed to a finance company. Unless she is a very unusual poverty-bracket housewife, she does not know that 'negotiable' means, 'You have to pay even though the machine is no good.' Ignorantia juris, however, haud excusat."[7]

Professor Friedmann recognises this for he writes:

> "One of the most important aspects of the transformation of a contract between supposedly equal parties into an instrument of 'command' i.e. a legal relationship in which one party dictates the terms of the bargain to the other, is the so-called standardized contract or contract of adhesion. In the modern industrial society, this is by far the most important form of contract. Standard terms control virtually all forms of public transportation, by air, ship, rail, bus. The conditions of insurance, mortgage, tenancy, hire-purchase, are all laid down

6. Some Notes on Law Schools in the Present Day (1969-70) Vol. 79 Yale L.J. 507.
7. Ibid at p. 508.

in standardized terms. The consumer or user is in no position to bargain about these terms. The only alternative he has is between acceptance or refusal. The latter however is virtually impossible, where the user or consumer is dependent upon the availability of the service or product."

How has the law responded to this problem?

The legislatures in some countries have enacted legislation to regulate the terms of hire-purchase agreements and other forms of money-lending transactions, and to prohibit carriers from excluding or limiting liability in contracts for the conveyance of passengers on public service vehicles. Courts in some jurisdictions have developed similar principles in the absence of legislation. But the total effort has been half-hearted and completely inadequate. It is difficult to disagree with Professor Black's conclusion that, "The contract law is for the 'haves'. It is for those who can afford lawyers, to draft and to sue. At its best, it harmlessly mediates deals between fairly large businessmen. At its worst, it is a weapon in the hands of businessmen, for them to use on the rest of us, and most destructively on the poor."

Concentration of Economic Power

One of the problems which the law has been invoked to deal with in the family of mixed economies, is the excessive concentration of economic power. There are laws against monopolies, against price-fixing agreements and against other forms of conspiracies in restraint of trade. The Sherman Anti-Trust Act and the Clayton Act of the United States are good examples of such laws. The basis for such legislation is that monopolies are contrary to public interest because they result in "arbitrary and unreasonable prices, of limitation of production, and of qualitative deterioration of commodities". The American legislation is, by all accounts, armed with the sharpest teeth, and most rigorously enforced.

But Friedmann writes that the consensus of opinion is that it "has not stemmed the increasing concentration of economic power in a relatively small number of big corporations, and that small business in manufacturing, retailing and services is on the decline. But... without any such legislation, monopoly control of major branches of the economy, such as the oil, steel, aluminium and chemical industries, would have become inevitable. Instead, there prevails in the major industries, an oligopoly i.e. predominant control by a small number of large companies, which remain in theoretical competition. While open and formal agreements on such matters as prices, production quotas or the boycott of new competitors, have been held to be legally invalid, the de facto co-ordination of the major corporations, with regard to price policies, labour agreements and other vital matters, is evident".

If private enterprise monopolies are objectionable as being contrary to public interest, the question may be asked whether public enterprise monopolies are equally objectionable. In many mixed economies the State owns and manages the utilities company. In Singapore, for example, the Public Utilities Board has the monopoly of supplying the community's needs for water, gas and electricity. The Singapore Telephone Board is also owned by the State. In the case of the utilities a very formidable case can be made for giving the public enterprise a monopoly. First of all, water and power are such basic needs that the State should ensure that their rates are within the ability of even the poorest members of the community to pay for them. Second there are very clear security and strategic implications which justify the State's control of its water resources and the generation of power. Third, adequate supplies of water and power, and at reasonable costs, are crucial to the success of the State's development plans. For all these reasons, it seems justifiable for public enterprises to be given the monopoly to supply utilities.

The danger is that a monopolistic State enterprise might deviate from its raison d'etre and behave no differently from a monopolistic private enterprise. This happens when a monopolistic State enterprise, whose reason for being is public welfare, deserts this objective and embraces the objective of maximising profits. One has also to guard against the monopolistic State enterprise becoming sluggish and inefficient resulting in arbitrary and unreasonable prices, and in giving deteriorating service.

The problem of guarding against the excessive concentration of economic power is a very difficult one in the developing countries. In most developing countries with mixed economies, there is a scarcity of developmental capital and of entrepreneurship. The few people with both capital and know-how therefore tend to control the economy.

The government has little choice but to co-operate closely with these few entrepreneurs. In many cases, the Government pursue a policy of economic autarky in order to induce rapid industrial development. The industrialists therefore enjoy a State-enforced condition of monopoly for their industries. Import restrictions and tariff protection, which are designed to be temporary measures, have a tendency to perpetuate themselves. Behind these protections inefficient industries struggle to survive. The real victims are the consumers who are indirectly subsidising these inefficient industries and compelled to buy their inferior products.

STATE AS ENTREPRENEUR

Professor Friedmann shows that the entrepreneurial role of States has been steadily increasing and asks the question why this has been so. He thinks that there are at least four reasons to account for this development. First, the belief that the transfer of economic life to the control of the State will provide a nucleus for the economic expansion of the nation and offer the advantage of large-scale operation without the disadvantage of private monopoly. Second, in some areas public enterprise has grown because private enterprise would not or could not intrude. An American example is the Tennessee Valley Authority. A Singaporean example is the provision of low-cost housing by the State through the Singapore Housing and Development Board. Third, where there is a scarcity of private venture capital. Fourth, public enterprise is sometimes the child of emergency.

Professor Friedmann divides State enterprises into three types: departmental government enterprises, public corporations, and commercial companies. All three types of State enterprise are present in Singapore. Concerning public corporations, Professor Friedmann points out that the most serious single problem is the "tension between autonomy of management and the tendency of the superior government authority i.e. the responsible Minister, to interfere with the operation of the enterprise for political reasons." In theory, the Minister should give only general policy directions. But in practice, according to a general criticism voiced in Britain, "... Ministers tend to meet privately with the directors of the enterprise and give policy directions, as it were, over a cocktail, or behind closed doors". Although Singapore has many public corporations, the field has never been studied. Do the managers of our public corporations enjoy more or less autonomy than their British counterparts? One wonders.

Professor Friedmann writes that State participation in private law companies is relatively rare. This is not so in the case of Singapore where the State has equity participation in a whole range of private law companies from hotels, to a petroleum refinery, from wood and paper products to ship-building. The question may be raised whether a movement towards the co-ordination of these widely scattered interests would be desirable and timely. According to Friedmann, Italy established a Ministry of Government Holdings, in 1956, which co-ordinates the reports of all forms of State enterprise and submits them to Parliament and in France, a recent official report has recommended that all State participation should be combined in a central holding company.

Social Welfare, Cost Benefit Analysis & Public Enterprise

Profitability is the yardstick used to measure the efficiency of a private economic enterprise. Friedmann has raised the important question whether public enterprise can be adequately appraised by the same criterion. His answer is no. Friedmann writes:

> "The government enterprise, whether monopolistic or competitive with private enterprise in the same area, must clearly be held to standards of efficient management and commercial accountability. But profitability cannot be defined in terms comparable to those of a private enterprise without falsifying or distorting the basic objectives of public enterprise as an expression of the social welfare function."

Friedmann also says:

> "What is certain is that a choice compatible with minimum conditions of satisfactory social survival cannot be made by individual or private enterpreneurs, each concerned with the maximization of profits. The ordering hand of the

> state is indispensable, and some of these ordering functions can only be undertaken by public enterprise, even if it cannot be profitable on a short-term and isolated calculation of profit and loss."

The reviewer agrees with Professor Friedmann's views and would like to suggest that such an approach should be applied to the question presently under study in Singapore i.e. whether or not to build a Mass Rapid Transit System for Singapore. The Government should not be deterred from embarking upon such a project merely because it may not be commercially profitable. This is because other vital social interests such as the quality of our environment, the quality of life, clean air, are at stake. As Friedmann has said, in the interests of our civilized survival, the State must intervene where private entrepreneurs, each concerned with the maximization of profits, would not intrude.

ADMINISTRATIVE JUSTICE

The functions of the State have changed radically over the past century. Professor Friedmann writes that:

> "Through the provision of social benefits of all kinds, through the power to grant or deny licences for professional occupations, for the establishment of industries, for imports, for the allocation of foreign exchange, and through the establishment of government-owned and publicly-controlled enterprises, the State now interferes in the life of the community that bears little resemblance to the State of even a century ago."

Professor Friedmann points out that in the Common Law countries, there are two kinds of legal procedure by which courts can and do exercise control over some of these processes and institutions. They are first, the prerogative writs and second, the ordinary remedies of injunctions, declaratory judgments, actions for damages, or special statutory actions. Professor Friedmann points out that, "The multiplicity of remedies does not however insure that a recourse will be available against an administrative decision." This is due to the "lack of a general principle of judicial review, the overlapping and bewildering confusion of remedies, and the absence of a clear structure of administrative justice."

What are the alternatives to the status quo?

The first would follow the French pattern of establishing a. general administrative appeal court which could deal with all appeals against the decisions of administrative authorities. The advantage of this alternative, according to Friedmann, is that it would be "conducive to the unifying (of) precedents and principles".

The second solution is to create several specialized courts dealing with appeals in various fields.

The third solution is to permit an appeal from decisions of the various administrative bodies to a higher common law court. The disadvantage of this solution is that unless a special division of the High Court is created to deal with such appeals, we are likely to have "judges untrained in the complexities of contemporary administration and the welfare state (who) would deal largely with matters in which they have no expertise."

What is the position in Singapore?

Singapore certainly qualifies as an activist state. The State provides social insurance. It exercises controls over private contractual and property relations such as rent control, money-lending transactions, planning and zoning restrictions etc. The State plays an active part in the economy. It also grants occupational and professional licences, import and foreign exchange controls, licences for industries and various forms of tax exemptions and reductions.

Like other common law countries, there is hardly any body of administrative law and certainly no systematisation of the administrative appeal procedure, in Singapore. What Friedmann has said of common law countries generally is fully applicable to Singapore, perhaps even more so for the administrators in Singapore have a tendency to hide their decision-making process behind the shroud of secrecy. Take, for example, appeals against the refusal of planning permission. No reasons are ever given for the disposition of the appeal. The report submitted by the official

who heard the appeal to the Minister is not made available to the parties and it is therefore never known whether the Minister has accepted the official's recommendation or rejected it. In some areas there is not even a legal review procedure.

In conclusion, let me say that Professor Friedmann has given us a lucid, interesting and systematic exposition of the various areas of economic life, and the various forms in which the State has intervened in the family of 'mixed economies'. Professor Friedmann has also tried to define the requirements of the Rule of Law in the face of increasing State activity in these economies. Any person interested in public law would find this beneficial and absorbing reading.

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